

## Board Liability and Insurance Issues

A non-profit organization Board that hasn't explored the issues of Board liability and the need for insurance is running a very big risk. Not all non-profit Boards will reach a conclusion they need special insurance - but all non-profit Boards should have the discussion.

Because of the complexity of this issue, it is important for your Board to familiarize itself with potential risks it might face and ways to minimize those risks. Jonathan Swift suggested, "Fortune knocks but once; misfortune has much more patience."

Charles Tremper and George Babcock in their booklet "The Nonprofit Board's Role in Risk Management: More than Buying Insurance" suggest that an effective Risk-Management Process includes at least five steps:

- Identify Risks
- Analyze options for eliminating or reducing risks
- Select the most suitable options
- Implement the techniques
- Monitor the techniques and modify as needed.

Typically an organization will have four ways to manage risk;

- avoid it
- reduce it
- retain it
- transfer it.

Purchasing insurance is a very common way to transfer risk. A BoardSource Oct-Nov. 1992 Special Edition publication suggested; "There is no such thing as one-stop shopping to protect board members from liability; instead, it is a matter of piecing together a variety of individual elements that, when integrated, will serve the organization's needs."

The same publication suggests that there are five principal measures by which board members can be protected from liability;

- responsible governance practices
- state volunteer-protection laws
- indemnification (self-insurance)
- general and other liability insurance
- directors' and officers' liability insurance

### Responsible Governance Practices:

Leifer and Glomb, in *The Legal Responsibilities of Nonprofit Boards*, suggest, "Clearly, the best way for a board member to avoid personal liability is to avoid conduct that breeds liability."

Every non-profit organization should have a thorough Board member orientation process.

Personnel policies should be established and reviewed carefully on a regular basis. The non-profit should adopt a conflict-of-interest policy for the Board and staff.

### **Federal Volunteer Protection Act of 1997**

At the Federal level, The Volunteer Protection Act of 1997, Public Law 105-19, 42 U.S.C. 14501 et seq provides an effort to limit the liability exposure of volunteers.

The legislation provides that no volunteer of a nonprofit organization or governmental

Entity shall be liable for harm (which includes economic and non-economic losses) caused by an act or omission of volunteers on behalf of such organization or entity so long as;

1. the volunteers acted within the scope of their responsibilities;
2. they were properly licensed or certified, if required;
3. the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of individuals harmed by the volunteer;
4. the harm was not caused by a volunteer operating any motorized vehicle or craft which required the operator or owner to possess an operator's license or maintain insurance.

A volunteer is defined as any individual who performs services for a nonprofit organization or a governmental entity and who does not receive compensation or anything in lieu thereof (other than reasonable reimbursement for expenses) in excess of \$500 annually. Volunteer also covers people operating as a director, officer, trustee or direct service volunteer.

This Federal Law preempts the law of any state to the extent that such state laws are inconsistent with the Act's provisions unless such state law provides volunteers additional protections from liability.

#### State Volunteer-Protection Laws:

Every state has also enacted legislation that seeks to make board members immune from some types of liability and to limit suits against them. Typically the volunteer-protection law will grant immunity from liability to board members unless they have acted with gross negligence, recklessness, willful and wanton misconduct. The volunteer-protection laws don't bar the most common types of employment related claims – which typically are about 90% of all the claims made against a board.

In Missouri, Section 537.118.2 RSMo (1994) provides that volunteers of a nonprofit organization or governmental entity are immune from personal liability for any acts or omission resulting in damage or injury to any person intended to receive benefit from such volunteer's service, if;

1. the volunteer acted in good faith and within the scope of his or her official function and duties with the organization;
2. the damage or injury was not caused by the intentional or malicious conduct or by the negligence of such volunteer.

To the extent that Section 537.118.2 would provide less protection to volunteers than the Federal Volunteer Protection Act of 1997, the Federal law would preempt Missouri's law and could provide volunteers with some shield from liability.

#### Indemnification:

An organization can attempt to pay with its own resources the legal costs, judgements and settlements of suits against its board members. To do so, the organization must state in its bylaws what suits it will indemnify. But the non-profit might not have the necessary resources to fulfill its indemnity obligations.

#### General and other Liability Insurance:

General liability insurance can be purchased to cover the organization and may cover board members for their involvement in bodily injury, property damage and some types of personal injury suits. But general liability insurance won't cover suits alleging unfair employment practices, failing to make prudent decisions, and bad management practices.

A board member's personal automobile, malpractice and umbrella policies will cover some board activities.

### **Directors' and Officers' Liability Insurance**

D & O liability Insurance pays defense costs, settlements and judgements for some forms of suits against board members. This form of insurance enables an organization to fulfill its indemnity obligations to its board members. D & O liability insurance can also cover some employment-related claims against board members. There is no such thing as a "standard" D & O Liability policy. If you consider purchasing a policy for your organization, pay special attention to the limitations and exclusions to be included in your policy.

Typically the larger the asset base and the greater number of employees within the non-profit organization, the greater the potential need for D & O Liability insurance. The October/November 1992 issue of Board Member suggests these other factors to consider in the decision on whether to purchase D & O Liability insurance;

- the ability of the organization to reduce the likelihood of a claim through effective risk management;
- the willingness of board members to accept the risk of personal liability;
- the capability of the organization to indemnify its board members;
- the capacity of the organization to self-finance an effective defense and if necessary to pay a settlement or judgement;
- the likelihood of experiencing a claim;
- the estimated expense of a claim.

A good reference for further research into the issue of Board Liability is BoardSource.

Two specific resources they offer are;

*The Nonprofit Board's Role in Risk Management: More than Buying Insurance*, NCNB Governance Series 5 (1998) by Charles Tremper and George Babcock

and

*Board Members and Risk – A Primer on Protection from Liability* (October/November 1992 Board Member Special Edition)

Information on how to order these materials can be obtained at:

BoardSource, 1828 L Street, NW Suite 900  
Washington, DC 20036-5104 ((800)883-6262, (202) 452-6262 <http://boardsource.org>)

NonProfit Risk Management Center, 1001 Connecticut Ave., N.W. Suite 410, Washington, D.C. 20036-5504, Phone: (202)785-3891 or [www.nonprofitrisk.org](http://www.nonprofitrisk.org)



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